CAN LAWYERS BE HONEST?

BY HOMER GREENE.

THERE is a popular opinion in America that lawyers, as a class, are dishonest. One is not obliged to go far nor live long in order to be able to make that affirmation. It is not a new opinion either. It dates from a "time whereof the memory of man runneth not to the contrary." Whether justly or unjustly, the dishonesty of lawyers has become proverbial. A white blackbird is no less *rara avis* in the common mind than is an honest lawyer.

A peculiar feature of the case is that lawyers do not, by reason of their calling, lose caste or credit. They are as highly regarded in the community as are the members of any other profession or calling. It does not seem to have occurred to the general public to look upon the question of their alleged moral laxity as one for serious consideration. The tendency has been rather to treat it as a huge joke. Indeed, tradition and the books are full of good stories told at the expense of professional integrity.

Perhaps the chief reason for this singular state of affairs is that the lawyer is believed to be dishonest only when his dishonesty will advance the cause of his client, and retard or defeat that of his opponent in the law.

This consideration brings up another peculiar feature of the case, which is that, as a rule, lawyers are believed to be honest with their own clients. Indeed, it may be said that the lawyer enjoys a respect and faith on the part of his client for which the merchant, the physician, even the preacher, may well envy him.

It will be seen, by this time, that it is not intended to include in this discussion those few members of the bar who disgrace their profession by the conduct of a highwayman or a hog. No doubt they justify whatever evil reputation they may have, but they bear too small a proportion to the whole number of lawyers

to deserve consideration here. The bulk of the legal profession —indeed an overwhelming proportion—is composed of men whose names are synonymous with respectability, and it is with this class only that it is proposed to deal.

The first question that arises in the case is this:

Does the conduct of lawyers, in the practice of their profession, justify the popular opinion concerning them? In other words, are lawyers as a class really dishonest? This question can be answered seriously in the affirmative only at the risk of rousing the warm indignation of all members of the bar.

No lawyer will admit that he is dishonest. Very few will charge themselves, even in the privacy of their own thoughts, with moral impropriety in practice. They are ready to justify themselves in any course they may take, and what they do they do, as a rule, with unburdened consciences.

Is this because they really do nothing amiss?

The cases in which an attorney will admit that he is on the wrong side of a suit at law are very rare. Yet will any candid lawyer dispute the fact that in at least 50 per cent. of the causes which he tries in court he would have appeared for the adverse party if that party had been the first to retain his services? Does it not seem that, from the attorney's stand-point, the question of right and wrong is largely determined by priority of retainer?

Suppose we examine into this question a little more closely. Take, for instance, a case involving the contract of a minor. A man seeks to be relieved from the fulfilment of a burdensome contract because at the time of making the contract he was a few days or weeks under the age of twenty-one years. How many attorneys are there at any bar who, on application for their services in the matter, would say to that man: "It is true that the law will relieve you from that obligation, but in honor you are bound to fulfil it, however burdensome it may be. You cannot retain my services in an effort of this kind"?

The average attorney looks at the legal rather than the moral aspect of the matter, advises the man that he has a good case in law, and accepts a retainer for his defence.

Now, no one will deny that it is really unmanly and ignoble for a man of sound mind to plead the "baby act" in order to avoid an honest obligation. Why is the attorney who assists him in doing so less unmanly and ignoble? The client may have

his moral judgment warped by the interest he has at stake; but there is no reason why the attorney should be similarly affected. Is it true that a client who is seeking to attain an end in law inconsistent with just principles may be guilty of moral impropriety while the attorney who advises and aids him is justified and innocent?

Light will be thrown on the answer to this question if we examine another rule of law in more general use, viz., the running of the statute of limitations against debts more than six years old.

Every one will admit that this is, in itself, a most just and judicious rule, and of great benefit to society at large. Yet there are cases—though, indeed, they are rare—where its enforcement works injustice and oppression. But in these cases the law can not step aside to favor those who may be prejudiced. The law must follow certain lines, and carry out certain principles, and be uniform in its application. Its processes must be invariable. It cannot be bent and twisted to take in each individual case. If it could be, it would be as worthless, as a standard of human justice, as individual judgment now is. To violate its rules or avoid its results for the purpose of saving one innocent man would be to open the door for the escape of a hundred or a thousand guilty ones. Indeed, the individual injustice that results from a strict application of the rules of law in an isolated case but serves to emphasize the strength and certainty of that law, and to inspire respect for and fear of it. Must, then, that lawyer who seeks the enforcement of a law which, while it is prejudicial to an individual in an exceptional case, at the same time strengthens the pillars of society—must that lawyer be set down as narrow-minded or dishonest? Is not he, by his effort, advancing "the greatest good of the greatest number"?

The law governs conduct, not motives. It is the duty of the courts to enforce the law in favor of any person who places himself within the proper limits of the law, regardless of his motive for so doing. Is the lawyer to set himself up higher than the law? Are the duties of lawyers more sacred than the duties of courts? If a man places himself within the rules and under the protection of the statute of limitations, are lawyers bound any more than courts are to go back and unearth his motive for such conduct?

Suppose the statement of his case which the client makes to the attorney does not, in the attorney's view, exhibit a perfectly moral motive or line of conduct: does it necessarily follow that, because the attorney's sense of the moral fitness of things does not quite coincide with that of his client, the ideas of the one must be unalterably right and those of the other unmistakably wrong? Is it any part of the duty of an attorney to fix a standard of morality for his client? Would not an attempt to do so be regarded as unpardonably presumptuous?

But there is something to be said in reply.

It must be admitted that neither the law nor the courts can discriminate between suitors, nor penetrate into the minds of parties at law in search of motives or morals. But does it therefore follow that it is not the duty of lawyers to do so? Does it not rather follow that, since it is without the province of the law and the courts, it is all the more the duty of the lawyer to do so? The task is not a difficult one. Motives are not far to seek in the light of past or proposed conduct. Why not, as lawyers, give aid to those whose motives are good, and refuse assistance to those whose motives look to inequitable results? And surely there are certain broad standards of right and wrong which one may follow safely without trespassing on debatable land in the domain of morals.

Again, it is true that the rules of law must be invariable and their application uniform, and that no lawyer is called on to violate or even to evade them in order to save the individual from unjust suffering. But is there any valid reason why he should not discourage, to the extent of his ability, that peculiar use of the law which leads to individual injustice?

But the problem has still other and more complex features.

Suppose, after a full examination of his client's case, the attorney finds that it is a good one in law and, for the greater part, in equity also; but that in some minor detail the client has erred or has even committed a wrong. Is it the duty of the attorney, because the case is tainted with this slight indiscretion, or marked with this unimportant attribute of evil, to refuse the client his assistance in obtaining that large measure of justice to which he is certainly entitled?

To carry the suggestion still farther: suppose an attorney undertakes a cause, having full faith in its perfect honesty and com-

plete equity, and, while actually engaged in the trial, learns of some small error on the part of his client in connection with the case, some venial wrong, some unjust or inequitable thing done by him, which, though not sufficient to outweigh the substantial justice of his cause, still places upon it a slight burden of unfairness. What is the attorney to do? Abandon the case on the high road to success for what most people would call a trivial reason?

Suppose, in addition to what he already knows, the attorney learns of something done or left undone, something about which his opponent is ignorant, but which, if revealed and presented to the court and jury, would so change the aspect of the case in law as to make it almost impossible for his client to recover. Is that attorney morally bound to point out to the opposition this defect in his case? to condemn openly his client's fault and parade his error? What would be thought and said of an attorney who should make such an exhibition as this in court? Would he not be called either a fool or a traitor?

Take a similar case in the criminal courts. Suppose the defendant is on trial for murder. Is the attorney bound, in justice to his client, prisoner and in chains though the client be, to conceal all the defects in his case? to suppress all evidence that is prejudicial to him, regardless of its character? to fight as bitterly against the revelation on the witness-stand of those truths that make against the prisoner as he fights earnestly to bring out those that are in his favor? Should the attorney's aim be to have the prisoner acquitted? or should it be to have him fairly tried, whether that trial result in acquittal or conviction?

But what would be thought of an attorney who, in a suit of this kind, would decline to take advantage of a technical error by which he might secure his client's acquittal, on the ground that it *was* a technical error and did not go to the merits of the case? What would be thought of him if he should allow, when he might have prevented, the presentation of damaging evidence against his client because he believed that evidence to be reliable and true? What would be thought of him if, in addition to this, he should actually produce such evidence on the part of the defence for the same reason?

It is difficult to conceive of a case of this kind, it is so far beyond precedent; but if such a case should occur, it is not hard to

imagine the denunciation that would be heaped on the attorney concerned in it. Yet if he is strictly honorable, if he is seeking for his client justice rather than acquittal, what course is open to him other than the one suggested?

Again, no attorney in asking for the judgment of the court on the legal aspect of his case, ever, by any chance, cites precedents that make for the opposing interests, unless he cites them for the purpose of refuting them. No attorney ever comments favorably to the jury on evidence that bears against his client, no matter how trustworthy or pertinent it may be.

If he has within his knowledge facts or precedents that, if known, would put the case of his opponent in a better light, he is the last one to disclose them. His policy is more or less a policy of concealment. But concealment not only leads to—it is in itself—deceit. Yet if deceit is one of the conditions of success in obtaining substantial justice for a client, why may it not, in this instance, be regarded as a virtue rather than as a fault? In other words, is not the standard of morals, in the practice of law, necessarily, one need not say lower than, but different from, that which should govern conduct in other relations of life? And may not a lawyer adopt, with propriety, the professional standard in his practice and retain the other at home and in society? As a matter of fact, is not this what is usually done? And is it not the secret of the respect which is had for lawyers at home and in society, and of the prevalent opinion concerning them so far as the practice of their profession is concerned? But is it an honorable consistency that has two standards of right and wrong, one for professional and one for private life? What difference can it make in the abstract honesty of the thing done whether it is a man's wife and children whom he attempts to deceive or the court and "gentlemen of the jury"? And why should it be less ignoble to do a dishonest or unfair thing in behalf of another than to do it for one's own benefit?

If the popular opinion be correct, that morality in its finer and more spiritual phases, and conscience in its fainter and more delicate promptings, are comparative strangers to those engaged in an active practice of the law while they are so engaged—if this be true, then why is it true?

The answer to this can better be given after considering what is really the most important and serious question at issue, viz.:

Can an attorney be successful in his calling if he follows the lines of integrity and the promptings of conscience with unvarying strictness?

It is not pleasant to say of any honorable calling that it places a premium on dishonesty; and so far as the practice of the law is concerned this may not be true. But take the instance already supposed, of the attorney who, while advising his client that he has a good case in law, refuses to be employed by him on the ground that the case has inequitable features, and that therefore a man of strict honor could not conscientiously give it his aid and support. How long would it be before that client would have in his employ some attorney whose conscience did not bind him with such rigid rules?

Suppose, as has already been suggested, that during the trial of a cause in court the attorney for one side or the other should arise and, in the expressive language of the day, "give the case away" because his strict sense of honor would not allow him to conceal an important fact or precedent. Would his client be likely to again intrust him with a case at law? Would ninety-nine out of a hundred persons who had heard his fatal admissions and statements employ him thereafter in any matter at law in which they might become parties? How long would it be, if he should persist in this general line of conduct, before prospective and active litigants would avoid him altogether? Surely no one would care to place important interests in the hands of an attorney who, by reason of a too tender conscience or an over-scrupulous sense of honesty, is liable at any moment to wreck the entire cause.

For what purpose do people employ attorneys? To advise them as to the moral status of their claims? By no means! They want to know, in the first place, whether they have good cases at law, and, if they have, they want those cases pushed to a successful issue, regardless of any questions of ethics that may arise concerning them. The bulk of the men who have business in the courts, in this era, consider themselves capable of being their own custodians of morals.

It may be well to say, at this point, that the clientage had in view in this discussion is not a clientage of rogues, but of that great body of respectable persons who enter or who are forced into litigation, believing that justice lies in the main, if not wholly, on their side.

But as a rule clients are blindly prejudiced in favor of their own view of a case. The old leaven of human selfishness works in them constantly to their own moral undoing. In order to win they will resort to conduct and methods that in any other person at any other time they themselves would denounce as disgraceful. And the serious part of it is that what they are willing to do for themselves they expect—yes, they demand—that their attorney shall do for them.

Does any one imagine that this is a pleasant position for the attorney? Does any one wonder that he is in danger of losing the finer edge from his moral sense? Doubtless there is no other honorable profession under the sun in which a man is so constantly and so sorely tempted to swerve from the straight line of strict honesty as he is in the law.

Is not this, after all, the secret of the decadence, if decadence there be, in professional morals?

The desire and aim of the client must necessarily reflect upon the attorney. The attorney, at the worst, is only what the client expects him to be, wants him to be, employs him to be.

Suppose the case were different. Suppose every prospective litigant were to relieve himself of all manner of blame before seeking the services of a lawyer, were to apologize if an apology was called for, pay money if money were due, confess and plead guilty if he had done a wrong or committed a crime, and, having exhausted every effort of the kind that a nice sense of honor would demand, suppose he were still compelled to go to law to obtain or protect his rights: what would the result be if he should lay the matter fairly before his attorney and say: "I want this case tried openly and honorably. I don't want a suspicion of unfairness or prejudice or undue advantage of any kind to attach to it in any way"?

Why, the result would be that the attorney would obey instructions and do so cheerfully. And if the opposing attorney were similarly instructed, what an unusual and refreshing spectacle there would be in court when that case should come on for trial! Yet there are few attorneys who would not rather, and far rather, conduct a cause after this fashion than with the usual concealment, evasion, exaggeration, and strained logic, if only they could be satisfied of the approval of their client and the appreciation of the public.

Suppose all clients should desire their cases conducted in this way and all attorneys should yield to that desire, as doubtless they would be glad to: how the character of litigation would be changed! how the atmosphere of the courts would be cleared and purified! what a moral revolution society at large would undergo!

The public may wag its head, and smile and talk as it will about the disingenuousness of lawyers, but when it has succeeded in taking the beam out of its own eye, it will be astonished to find that the motes in the eyes of its brethren, the lawyers, have already disappeared.

But this dream of a reformed society and a reformed bar is Utopian. Few people have yet attained to the point of perfection reached by these imaginary clients. Men must be taken as they are, not as they ought to be, in discussing problems concerning them; and there still remain among us those human prejudices and passions that govern individual conduct, and that, overflowing into the office of the attorney, drive him often to the verge of dishonor.

So the burden of the effort at reform rolls back again upon the attorney; and does it not properly belong with him, after all? Has not he the power of compelling would-be clients to come to him with clean hands and honest hearts? His aid is indispensable when the law is to be invoked. Suppose he were to refuse that aid until they shall have purged themselves of all manner of unfairness and deceit. Suppose—not one attorney alone, for that would mean professional disaster to him, as we have already seen, but—an entire bar should adopt a certain high standard of professional morals, and compel their clients to come to it and live up to it. Would not that solve the problem?

Utopia again! It is easy enough to form bar associations and lay down rules for the conduct of members, to a certain point, and to enforce them too. Direct falsehood, treachery to a client, a hundred unprofessional and dishonorable deeds, may be discovered and punished. But how can any man or set of men lay down rules to govern conduct in relation to those nicer moral qualities in which no man is capable of judging another; qualities which are too ethereal to be reduced to material form, too subtile to be moulded into definite shape, too spiritual to be defined in the language of men? In this moral domain there is no room for for-

mulated laws for the government of any conduct but self-conduct. Here each individual must be his own censor and guide.

Hence the fallacy, not to say the folly, of attempting to frame a system of laws which shall take in the entire range of professional ethics, with a view to its enforcement by any organization.

In the mean time this is the situation: The profession of the law is, to a certain extent, in ill repute. Lawyers are regarded, as a class, with something more than suspicion, so far as their professional integrity is concerned. More serious still is the fact that this suspicion is not wholly unfounded, and that this lack of integrity, if such it may be called, goes not only unrebuked by the people at large, but is actually placed at a premium by those people when they become prospective or active litigants.

For all this there should be a remedy. Who will suggest it?

Who will rescue a most honorable calling from its present unfortunate environment?

HOMER GREENE.